FOLEY
HOAG LLP
ATTORNEYS AT LAW

Mary Beth Gentleman
Boston Office
617-832-1199
mgentleman@foleyhoag.com

September 6, 2006

By Hand

Ms. Mary L. Cottrell
Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: NSTAR Electric Company, D.T.E. 06-40

Dear Ms. Cottrell:

On behalf of The Energy Consortium, I enclose for filing in the above-referenced docket one original and eight copies of the Initial Brief of The Energy Consortium.

Kindly date stamp the enclosed copy of this letter and return same to our messenger.

Thank you for your attention to this matter.

Sincerely yours,

Mary Beth Gentleman

Mary Beth Gentleman

MBG:jrd
Enclosures
cc: Joan Foster Evans, Hearing Officer (2 copies)
Paul Osborne, Rates and Revenue Requirements Division (1 copy)
Meera Bhalotra, Rates and Revenue Requirements Division (1 copy)
Jeff Hall, Rates and Revenue Requirements Division (1 copy)
Joseph Passaggio, Rates and Revenue Requirements Division (1 copy)
Shashi Parekh, Electric Power Division (1 copy)
Service List

B3249844.1

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company, Cambridge Electric Light Company, Canal Electric Company and Commonwealth Electric Company d/b/a NSTAR Electric)	D.T.E. 06-40

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the Initial Brief of The Energy Consortium upon the Department of Telecommunications and parties of record in accordance with the requirements of 220 C.M.R. 1.05 (Department's Rules of Practice and Procedures).

Mary Beth Gentleman

Mary Beth Gentleman
Foley Hoag LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600
(617) 832-1000

Dated: September 6, 2006

B3250048.1

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company, Cambridge Electric Light Company, Canal Electric Company and Commonwealth Electric Company d/b/a NSTAR Electric	)	D.T.E. 06-40

INITIAL BRIEF OF THE ENERGY CONSORTIUM

Mary Beth Gentleman
Richard W. Benka
Foley Hoag LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600

Dated: September 6, 2006

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company, Cambridge Electric Light Company, Canal Electric Company and Commonwealth Electric Company d/b/a NSTAR Electric	)	D.T.E. 06-40

TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company, Cambridge Electric Light Company, Canal Electric Company and Commonwealth Electric Company d/b/a NSTAR Electric	)	D.T.E. 06-40

INITIAL BRIEF OF THE ENERGY CONSORTIUM

I. INTRODUCTION

Though characterized by NSTAR as "a relatively simple transaction" (Exh. NSTAR-CLV-1 at 3), the proposed merger has certain features which would have significant adverse impacts on customer rates, competition and economic development. In order for the merger to satisfy the public interest standard under G.L. c. 164, § 96, the Department of Telecommunications and Energy ("Department") should condition any approval on the following changes:

A. the reclassification of the 13.8 kV transmission assets to distribution assets should become effective only after the second 115 kV circuit is completed and operational; in addition, the revenue requirements for the reclassified assets should be based on Department rate-making principles for distribution assets, not Federal Energy Regulatory Commission ("FERC") rate-making principles for transmission facilities;

B. the proposed increases in contract demand charges to the SB-G2 and SB-G3 rates of Cambridge Electric Light Company ("Cambridge") should be rejected as anti-competitive and contrary to the public interest;

C. the proposed further consolidation of Basic Service pricing, which is adverse to the development of a competitive retail market, should be rejected; and

D. customers should receive certain credits and be shielded by NSTAR from costs associated with delay in the construction of the Putnam Line.

The bases for these modifications are discussed in detail below.

II. PROCEDURAL HISTORY

On May 26, 2006, Boston Edison Company ("Boston Edison"), Cambridge, Canal Electric Company ("Canal") and Commonwealth Electric Company ("Commonwealth") (together, the "Companies" or "NSTAR") jointly petitioned the Department to approve, pursuant to G.L. c. 164, § 96, a merger among and between the Companies (NSTAR Petition, D.T.E. 06-40, at 1). Pursuant to an Agreement and Plan of Merger (Exh. NSTAR-CLV-2), Cambridge, Commonwealth and Canal would combine with and into Boston Edison. Boston Edison, in turn, would change its corporate name to NSTAR Electric Company (Exh. NSTAR-CLV-1 at 4). The proposed merger would entail a number of financial restructurings among and between the Companies. *Id.* NSTAR also proposed to consolidate its retail rates for Basic Service, the Pension Adjustment Factor and retail Transmission Service. *Id.* at 12. Finally, the merger proposal would reclassify the 13.8 kV facilities of Cambridge from transmission facilities to distribution facilities.

III. STANDARD OF REVIEW

The Department reviews mergers pursuant to its authority under G.L. c. 164, § 96 which requires, as a condition for approval, that mergers be "consistent with the public interest." That public interest standard has been construed by the Department as requiring a balancing of the costs and benefits resulting from a proposed merger. *Boston Edison Company*, D.P.U. 850, at 6-

8 (1983). To satisfy the so-called "no net harm" test, the costs or disadvantages of a proposed merger must be offset by benefits sufficient to warrant their allowance. *Boston Edison Company*, D.T.E. 99-19, at 10-11 (1999), citing *Eastern-Colonial Acquisition*, D.T.E. 98-128, at 5-6(1999); *NIPSCO-Bay State Acquisition*, D.T.E. 98-31, at 9-10 (1998); *Eastern-Essex Acquisition*, D.T.E. 98-27, at 8 (1998); *Boston Edison Company/Boston Edison Mergeco Electric Company*, D.P.U./D.T.E. 97-63, at 7 (1998); *Mergers and Acquisitions*, D.P.U. 93-167-A at 18-19 (1995). The public interest must be at least as well served by an approval of a proposal as by its denial. *Boston Edison Company*, D.T.E. 99-19, at 10 (1999), citing *Eastern-Colonial Acquisition*, D.T.E. 98-128, at 5 (1999); *NIPSCO-Bay State Acquisition*, D.T.E. 98-31, at 9 (1998); *Eastern-Essex Acquisition*, D.T.E. 98-27, at 8 (1998); *Boston Edison Company*, D.P.U. 850, at 5-8 (1983).

Proponents of a merger proposal must quantify the costs and benefits of the proposal to the extent that such quantification is feasible. *Boston Edison Company*, D.T.E. 99-19, at 12 (1999), citing *Eastern-Colonial Acquisition*, D.T.E. 98-128, at 7 (1999); *NIPSCO-Bay State Acquisition*, D.T.E. 98-31, at 11 (1998); *Eastern-Essex Acquisition*, D.T.E. 98-27, at 9 (1998). General assertions are not adequate; a demonstration that the benefits justify the costs is necessary. *Id.*, citing *Eastern-Colonial Acquisition*, D.T.E. 98-128, at 7 (1999); *NIPSCO-Bay State Acquisition*, D.T.E. 98-31, at 11 (1998); *Eastern-Essex Acquisition*, D.T.E. 98-27, at 10 (1998); *Mergers and Acquisitions*, D.P.U. 93-167-A at 7 (1995).

As set forth in *Mergers and Acquisitions*, among the factors which the Department may consider are (1) impact on rates; (2) impact on quality of service; (3) resulting net savings; (4) impact on competition; (5) financial integrity of the post-merger entity; (6) fairness of the distribution of resulting benefits between shareholders and ratepayers; (7) societal costs; (8)

impact on economic development; and (9) alternatives to the merger or acquisition. *Id.* at 7-9. However, these are not the only factors the Department may consider. *Boston Edison Company*, D.T.E. 99-19, at 11-12 (1999), citing *Eastern-Colonial Acquisition*, D.T.E. 98-128, at 6 (1999). The Department may consider special factors of an individual proposal to determine whether it is consistent with the public interest. *Eastern-Colonial Acquisition*, D.T.E. 98-128, at 5 (1999).

IV. ARGUMENT

A. The proposed transfer of the 13.8 kV facilities is premature and the associated revenue requirements are unsubstantiated.

1. The proposed transfer is premature.

The pre-filed testimony of Ms. Vaughn in support of the reclassification of the 13.8 kV facilities (hereinafter, the "13.8 kV Reclassification Plan") asserted that with "the recent completion of the East Cambridge Substation", those facilities no longer function as transmission facilities:

> However, with the recent completion of the East Cambridge Substation, Cambridge is no longer reliant on the Kendall Generation Station for servicing any of the load requirements of its customers. As such, facility changes have occurred where the Kendall Generating Station is now interconnected to the Cambridge system through a 115 kV line to its new East Cambridge Substation and through a second 115 kV line to its Putnam Substation. Thus the function of the 13.8 kV system has shifted from a transmission system to a more typical distribution system, where its function is to supply power to local distribution customers.

(Exh. NSTAR-CLV-1, at 21.)

However, that testimony was subsequently corrected to reflect the fact that the second planned 115 kV transmission line interconnection from the Putnam Substation to East Cambridge Substation (hereinafter, the "Putnam Line") is not yet completed (Exh. NSTAR-CLV-1, at 21-22 (Revised)). Cambridge clearly has a plan to end completely its reliance on the

13.8 kV system to provide transmission service from Kendall Generating Station to its local load centers, however, that plan has not yet been fully implemented. Although NSTAR initially represented that load will be completely transferred to the new East Cambridge Substation "later in 2006" (Exh. NSTAR-CLV-1, at 18), it later acknowledged that the transfer will not be performed until after the Putnam Line is completed (Exh. AG-5-4(a)). According to NSTAR, the timing of the completion of that installation is still unknown:

> The transfers will be performed after the second 115 kV circuit is successfully installed from Putnam Station to East Cambridge Station. The installation has become far more complicated than originally planned since numerous obstructions have been encountered in the conduit system between Putnam and East Cambridge Stations, which resulted in damage to cables being installed. There have been several attempts to locate and overcome these obstructions in a non-invasive manner. NSTAR Electric is conducting an extensive and detailed investigation to resolve these obstructions and the timing of their resolution is not yet available.

Id.

Three steam units and Jet No. 1 at Kendall Generating Station are interconnected to Cambridge's 13.8 kV network system. (Exh. RR-AG-10 (Att. RR-AG-10 Explanatory Statement in Support of Uncontested Settlement [*Mirant Kendall, LLC and Mirant Americas Energy Marketing, LP*, Docket No. ER05-26-000] at 1-2)). In summer of 2004, ISO New England, Inc. ("ISO-NE") determined that Steam Units No. 1 and 2 and Jet No. 1 are necessary to serve Cambridge's local area reliability needs until the completion of certain proposed local system improvements. *Id.* at 2-3. In addition, consistent with the terms of the Revised RMR Agreement, Steam Unit No. 3 also provides local area reliability support to Cambridge. *Id.* at 6. Until the 115 kV transmission system upgrades are completed and functioning, the 13.8 kV assets are still needed to provide transmission service for Kendall Generating Station and the Revised RMR Agreement is still in place. Exh. AG-5-4(d). Reclassification of the 13.8 kV assets now from transmission to distribution would therefore be premature. Approval of such transfer should be effective no earlier than (i) the commercial date of operation of the Putnam Line, (ii) transfer of load to the East Cambridge Substation, and (iii) proper resolution of the rate-making issues discussed in Section IV.A.2, *infra*.

While the Settlement Agreement approved by the Department in D.T.E. 05-85 (hereinafter, "Rate Settlement Agreement") provides that the merger occur on January 2, 2007, the Department did not authorize an automatic asset reclassification as of that date. Implementation of the merger was clearly subject to the receipt of necessary approvals from the Department and the Federal Energy Regulatory Commission ("FERC"), including regulatory approvals of the 13.8 kV asset transfer (Rate Settlement Agreement, § 2.16).[1]

2. The record lacks sufficient evidence for the Department to determine the distribution revenue requirements of the 13.8 kV facilities.

Costs associated with the 13.8 kV assets are currently included in Cambridge transmission rates (Exh. NSTAR-CLV-1 at 20). The revenue requirements upon which those rates are based have been determined by FERC based on its standards for the recovery of transmission facility costs (Exh. NSTAR-CLV-1, at 27-28; Exh. NSTAR-CLV-7; Exh. DTE-1-11; Tr. 3, at 392-393). As proposed, NSTAR's 13.8 kV Reclassification Plan would allow Cambridge to recover in distribution rates the 2006 revenue requirement for those assets at the level that would have been allowed by FERC if they were still transmission facilities (Tr. 2 at 267). That amount has been estimated by the Companies as in excess of $13.4 million (Exh. NSTAR-CLV-7, at 1, line 28; Tr. 2, at 266-267).

[1] Section 2.16 of the Rate Settlement Agreement provides, in part, that "[t]he Settling Parties agree that said merger may be accomplished by the implementation of an agreement and plan of merger, *and after other appropriate Department approvals* determined under G.L. c. 164, §§ 14, 21, [and] 96, in separate proceedings, *and formal petitions approved by the Federal Energy Regulatory Commission* ("FERC") (emphasis supplied).

NSTAR's 13.8 kV Reclassification Plan is contrary to § 2.18 of the Rate Settlement Agreement and Department rate-setting principles. First, distribution rates for the Companies must be based on a June 30, 2005 rate base and test year June 30, 2005 expenses adjusted for known and measurable changes (Tr. 3, at 400, 402), not 2006 year-end rate base and 2006 expenses as NSTAR proposes for these assets (Tr. 3, at 400-403). Second, the Department's allowed rate of return for NSTAR is lower than that allowed by FERC (10.5 to 11.5 percent versus 12.8 percent, respectively) (Tr. 3, at 398). Third, in the Rate Settlement Agreement proceeding, NSTAR assumed a 50/50 debt/equity ratio whereas here, for the 13.8 kV system transfer calculation, NSTAR assumed a 40/60 debt/equity ratio. *Id.* Fourth, the language of § 2.18 of the Rate Settlement Agreement in fact suggests that any reclassification must take place "after the consummation of the merger" and "after a separate proceeding," not as part of the instant merger proceeding. Finally, the Department must have a reasonable basis for setting rates; it cannot excuse NSTAR from providing a distribution revenue requirement calculation because it would be "costly, time-consuming, and it wouldn't be ready in time . . ." (Tr. 2, at 280; see also Exh. DTE-6-1).

The Companies' witness, Ms. Vaughn, asserted that this "rate neutral" transfer of FERC-established transmission revenue requirements into distribution rates was allowed pursuant to § 2.18 of the Rate Settlement Agreement (Tr. 3, at 403-404). However, the language of that section provides no support, explicit or implied, for such rate treatment. It merely states, in pertinent part, as follows:

> However, because Cambridge's 13.8 kilovolt ("kV") facilities are presently classified as transmission facilities for rate recovery (see D.P.U./D.T.E. 97-93 (1998)), the Settling Parties agree that after the consummation of the merger Cambridge's 13.8 kV facilities shall be reclassified as distribution facilities and recovered in distribution rates after a separate proceeding.

There is no mention whatsoever in this provision that the costs to be recovered shall be determined using FERC's rate-setting methodology for transmission assets. Section 2.18 merely provides for the reclassification of the facilities and recovery in distribution rates. Had the Companies wanted to secure a FERC-established revenue requirement for the transfer, they could have sought that treatment as part of the Rate Settlement Agreement and included such language in § 2.18. It is unclear, however, whether the Department would have approved such language. What is clear is that in approving the Rate Settlement Agreement with the language of § 2.18 as is, the Department did not abdicate its rate-making authority to FERC with respect to the assets to be transferred. Moreover, the language of § 2.18 in no way justifies recovery of additions to the 13.8 kV system or associated expenses incurred since June 30, 2005. Finally, neither § 2.18 nor any other provision of the Rate Settlement Agreement contemplates Cambridge being able to apply the so-called "Simplified Incentive Plan" ("SIP") (Rate Settlement Agreement, § 2.6) annually to a transmission-based revenue requirement.

On cross-examination, Department staff queried NSTAR's witness on the alternative of simply "taking the revenue deficiency applicable to the 13.8-kV facilities as of June 30, 2005 [Exh. DTE-1-21], and transferring that amount to distribution rates" (Tr. 3, at 410). While that approach might produce a result that conforms to a greater degree with the Department's rate-setting requirements than NSTAR's proposal, the revenue requirements presented in DTE-1-21 are based on a cost service study which was not adjudicated and, in all likelihood, overstates Cambridge's revenue requirements. Current Cambridge distribution rates appear to over-collect by at least $1.42 million dollars. 2005 Customer and Distribution Revenues totaled $23.051 million (Exh. MIT-2-19 (Att. MIT-2-19 at 1)) versus its Distribution Revenue Requirement of

$21.631 million (Exh. DTE-3-6). Adding to that over-collection by inserting FERC-established transmission revenue requirements into distribution rates would add insult to injury.

The Companies' witness, Ms. Vaughn, testified that approval of the transfer of the 13.8 kV assets from transmission to distribution is a crucial precondition to consummating the proposed merger.[2] To reconcile the competing interests of NSTAR in having the assets reclassified and of Cambridge customers in having only a just and reasonable revenue requirement for the 13.8 kV assets inserted in rates, the Department should allow NSTAR to file a cost of service study for the 13.8 kV assets, consistent with the Department's regulatory requirements. Given that NSTAR did not file a distribution revenue requirement calculation for the facilities in this proceeding, more time will be needed for NSTAR to undertake that work.[3] This will cause little or no delay in the reclassification, in real terms, however, because the transfer is not appropriate until the 115 kV upgrades are completed, including the Putnam Line, and the 13.8 kV assets are no longer functioning as transmission assets, consistent with the FERC seven-part test (Exh. NSTAR-CLV-1, at 23; Exh. DTE-2-10).[4]

NSTAR expressed a strong desire, from an accounting perspective, to have the transfer occur "at a year end point" because "transmission rates are based on year-end rate base" (Tr. 3, at 413). Given the amount of construction work left to be done (*see* Section IV.A.1, *infra*) and the need for the Department to properly determine the revenue requirements associated with the

---

[2] Q: . . . Will NSTAR implement the proposed merger if its proposed transfer of the 13.8-kV system from transmission to distribution is not allowed? A: No (Tr. 2, at 290).

[3] On cross-examination by Department staff, NSTAR offered no valid reason for failing to prepare a distribution revenue requirement consistent with Department requirements during the seven months after the approval of D.T.E. 05-85 (Tr. 3, at 393-394.)

[4] NSTAR has stated unequivocally that completion of the second 115 kV cable is necessary for the 13.8 kV assets to satisfy the seven-part test: "The 13.8 kV seven-part test results referenced in Exhibit NSTAR-CLV-1, at 23, change with the addition of the East Cambridge Substation and 115 kV line. This is scheduled to be completed by the end of 2006 *with the installation of the second cable*" (Exh. DTE-2-10)(emphasis supplied).

13.8 kV assets, the transfer may be able to occur at year's end 2007. There is no need to rush to transfer into distribution rates the erroneous transmission-based revenue requirements and, more importantly, no statutory or regulatory basis for doing so.

B. The proposed net increase in Standby Service rates of Cambridge should be rejected.

1. The rate increase is significant.

The most problematic feature of the Companies' proposed merger is its impact on Standby Service rates for customers in the Cambridge franchise area. As discussed in Section IV.A.2, *infra*, the Companies' 13.8 kV Reclassification Plan would transfer in excess of $13.4 million in transmission costs into distribution rates. Initially the 13.8 kV Reclassification Plan was billed by NSTAR as "revenue neutral for NSTAR Electric and for each of Cambridge's rate classes" (Exh. NSTAR-CLV-1 at 28). The Companies claimed that "distribution prices for each rate class will be increased by the corresponding decrease in transmission prices for each rate class." *Id.* However, a closer examination of the Plan revealed that, in fact, standby distribution rates (hereinafter, "contract demand rates") for Cambridge tariffs SB-G2 and SB-G3 will be increased by a minimum of 48 percent and as much as 239 percent outright (Exh. RR-TEC-2 (Att. AG-2-2(b1) at 8)).

NSTAR's rate witness, Mr. LaMontagne, attempted to downplay the significance of these increases by characterizing them as just the result of "a mechanical operation of the transfer of 13.8-kV facilities from transmission to distribution" (Tr. 2, at 192-193). On redirect, he further attempted to dismiss the significance of the rate impact by suggesting that on-site generation customers should expect "input changes in the economics" of such projects (Tr. 2, at 232). However, when asked to calculate the absolute dollar increase for a 20 MW contract demand customer (Tr. 2, at 241), the significance of the proposed increases became clear: the difference on the contract demand portion of the rate would be approximately $400,000 a year (Exh. RR-MIT-2, at 1). However, the Companies accompanied that estimate with a limp assertion that the actual rate impact will be "negligible." The Companies' argued that, in their experience, all on-site generators take some amount of Supplemental Service to balance load or for outages. *Id.* The Companies then suggested that because customers will not be charged the distribution service contract demand charge for supplemental service above the contract demand level, "these offsetting rate effects would make the total rate impact negligible and of no material consequence to a customer." *Id.*

The record evidence, however, demonstrates that the impact is indeed material. By NSTAR's own calculation, the contract demand charge for Standby Service under the SB-G3 rate would increase by 105 percent (Exh. RR-DTE-1)[5]. NSTAR's most recent recalculation of the likely impact (Exh. RR-DTE-1 (Supp)(Att. RR-DTE-1(b)) is a valiant attempt at impact dilution. Designed to minimize the appearance of the impacts, it is based on operating assumptions which are not supported by any data, studies, statistical analyses or other evidence upon which the Department could rely. For example, the revised calculations assume that the monthly internal demands are proportionate to the monthly pattern of *average* Rate G-3 class demands, and the monthly load factors for the on-site generation customer equal the *average* annual load factor for all G-3 customers (Exh. RR-DTE-1(Supp) at 1). To reach its desired result, NSTAR assumes for this calculation that the customer uses the distribution system to take Supplemental Service 11 out of 12 months.

Not only does NSTAR fail to provide any statistical support for the last assumption, but it is directly at odds with NSTAR's stated position in D.T.E. 03-121. NSTAR strongly opposed

[5] The 105 percent increase reflects a dollar increase for contract demand from $7,876 pre-merger to $16,192 post-merger. (Exh. RR-DTE-1).

the notion that on-site generation customers operate much like other G-3 customers. Specifically, in NSTAR's Reply Comments in D.T.E. 03-121, NSTAR stated:

> Although the Company incurs the same costs to serve standby and continuous use customers, the collection process to recover these costs must be different for standby customers *because of their infrequent and intermittent use of the distribution system* (emphasis supplied).

Id. at 26. The Department apparently agreed as it found that "[s]tandby customers use distribution services infrequently and intermittently" (*NSTAR Electric*, D.T.E 03-121, at 42 (2004). Having successfully argued in D.T.E. 03-121 that standby customers infrequently use the distribution system, NSTAR cannot now submit to the Department in good faith a Typical Bill Analysis that assumes that the typical Standby Service customer uses the distribution system 11 out of 12 months of the year. Even with these implausible assumptions, however, NSTAR's revised calculations document that the proposed increase in contract demand charges will increase the post-merger cost of Standby Service (Exh. RR-DTE-1(Supp) Attachment RR-DTE-1(b)).[6]

2. The increase in contract demand charges will have an adverse impact on competition and related public policy objectives.

For those hours during which on-site generation customers take Supplemental Service above their contract demand rate, they receive a credit for the contract demand portion of their Standby Service charge to avoid NSTAR charging them twice for distribution service under both Standby Service and Supplemental Service (Tr. 2, at 193-194). The Companies argue that to the extent customers with on-site generation take Supplemental Service from Cambridge, those

[6] Even with NSTAR's implausible assumptions, bill increases of between 3 and 7 percent are predicted (Exh. RR-DTE-1(Supp) (Att. RR-DTE-1(b), at 1)). Inclusion of competitive supply charges in that analysis is also misleading as it dilutes the percentage increase to the customer in the delivery charge. Netting out the competitive supply charges assumed by NSTAR, and holding all other NSTAR assumptions constant, the increase in delivery charges in the Typical Bill Analysis is as follows: 1 outage = 18.7% increase; 2 outages = 13.6% increase, and 3 outages = 9.8% increase in delivery charges as result of the proposed contract demand charge increase.

customers can avoid contract demand charges and enjoy reduced transmission charges "as customers take deliveries from NSTAR Electric's system on an as-used basis" (Exh. RR-MIT-2, at 1). However, that dynamic creates an anti-competitive incentive. The less Supplemental Service taken by customers with on-site generation, the greater is the incremental economic penalty from the proposed increases in contract demand charges. Put bluntly, the most efficient on-site generators, that is, those with the highest load factors and the greatest reliability, will be penalized the most by the contract demand charges. Those with low load factors or unreliable on-site generation will be penalized the least.

The standard of review for mergers under G.L. c. 164, § 96 entails consideration of factors such as the impact on competition (*Mergers and Acquisitions*, D.P.U. 93-167-A, at 7-9 (1995)) and any "special factors" of an individual proposal to determine whether it is consistent with the public interest (*Eastern-Colonial Acquisition*, D.T.E. 98-128, at 5 (1999)). The practical implication of the proposed increase in the contract demand charges under the Cambridge SB-G2 and SB-G3 tariffs is that customers who "draw energy from [NSTAR's] system periodically" (Exh. RR-MIT-2 at 1) will pay less in the contract demand charge than customers who buy less energy from NSTAR because of efficient on-site generation. It clearly penalizes on-site generation customers who are or will be successful in minimizing purchases of distribution services from NSTAR by the means of efficient on-site generation. Such discrimination is particularly unacceptable in a congested area such as NEMA, where the Cambridge franchise area is located, and where distributed generation could contribute to congestion relief.

The Department has long recognized distributed generation as an important resource option. *Distributed Generation NOI*, D.T.E. 02-38, at 1 (2002), citing *Competitive Market*

Initiatives, D.T.E. 01-54, at 11 (2001), *Qualifying Facilities Rulemaking*, D.T.E. 99-38 (1999), *Electric Industry Restructuring*, D.P.U./D.T.E. 96-100, at 23 (1998). The Department has observed that distributed generation can not only serve the energy needs of customers, but can also be a load response resource. D.T.E. 01-54, at 11. The Department has also recognized that distributed generation has the potential to relieve transmission and distribution constraints. D.T.E. 02-28, at 1.

The value of on-site generation resources was also emphasized last month in Governor Romney's new energy plan for the Commonwealth entitled "Massachusetts' Energy Future: A Balanced Approach." Exh. MIT-1. The plan suggests that electricity demand may exceed supply within the next five years. *Id.* at 2. "On-site generation infrastructure" was identified as a resource which could contribute to closing the expected gap between "peak demand growth" and resources. *Id.* at 10. Therefore, a stated objective of the plan is to "encourage on-site generation: reduce stand-by rates to drive private investment." *Id.* at 9. On cross-examination, NSTAR's rate witness, Mr. LaMontagne agreed that NSTAR's proposal to significantly increase Standby Service rates would be inconsistent with that policy directive (Tr. 2, at 188). Any merger proposal which includes a mechanism which will increase the barriers to the development of on-site generation is clearly not in the public interest.

3. The proposed increases in contract demand charges violate the Standby Service Settlement Agreement.

Standby Service tariffs for Boston Edison, Commonwealth and Cambridge are governed by a Settlement Agreement approved by the Department (*NSTAR Electric*, D.T.E 03-121 (2004)) (hereinafter, "Standby Rate Settlement Agreement"). The Attorney General recommended approval of the Standby Rate Settlement Agreement only on the assumption that a "more permanent rate design" would be developed at the time of "NSTAR Electric's next rate case."

Id. at 25. Similarly, the Division of Energy Resources ("DOER") stated that the "Settlement Tariff rates should remain in effect only until NSTAR Electric's next general rate case when the Company will provide a fully allocated cost of service study" and "the cost to serve on-site generation customers should be determined in the context of the next general rate case" *Id.* at 34. By virtue of the Rate Settlement Agreement in D.T.E. 05-85, NSTAR's next general rate case is unlikely to occur prior to 2012, and only at that time will the allocation of the costs NSTAR seeks to recover via its standby rates be examined in a rate case. However, in its Order approving the Standby Rate Settlement Agreement, the Department indicated that it "intends to investigate and address the issues raised by the Attorney General and DOER" in the context of the general investigation of interconnection tariffs in Docket D.T.E. 02-38. *Id.* at 51. At least until that investigation takes place, if not until NSTAR's next general rate case, the parties to the Standby Rate Settlement Agreement must be held to its terms. The Department should not allow the merger of NSTAR's franchise areas to become a mechanism for one party to amend unilaterally the terms of that Agreement. Had NSTAR wanted the flexibility to materially increase contract demand charges for Cambridge customers at such time as it transferred the 13.8 kV system from transmission to distribution, it could have sought that accommodation as part of the negotiation of the Standby Rate Settlement Agreement. It did not, however, and should not now be allowed to use its merger proposal to circumvent the terms of that Agreement.

4. Assuming a "negligible" rate impact, no Standby Service contract demand charge increase is needed to preserve revenue neutrality for NSTAR.

NSTAR argues that there is no bill impact on customers because there are no customers taking Standby Service at the present time under the Cambridge SB-G2 and SB-G3 rates (Exh.

MIT-1-19).[7] Assuming, then, that there are no Cambridge customers on Standby Service rates, leaving the contract demand component of the SB-G2 and SB-G3 rates exactly as is leaves NSTAR exactly where it is today. With no customers on that rate, there is no revenue loss to NSTAR from keeping the contract demand components exactly as is. This is particularly true if NSTAR is taken at its word when it says that the rate impacts of it proposal would be "negligible" and "not material" in any event. For this and the other reasons presented here, the Department should reject the proposed contract demand component increases.

C. Further blending of Basic Service rates will have an adverse impact on competition.

As part of its merger proposal, NSTAR is seeking to consolidate its retail rates for the Pension Adjustment Factor, for retail Transmission Service and for Basic Service (Exh. NSTAR-CLV-1, at 12). This consolidation effort would, according to NSTAR, "minimize the administrative burden of maintaining separate schedules, analyses and filings" and "will be simpler for customers to understand rates and rate changes by providing single unified rates." *Id.* NSTAR further suggests that "because the aggregate level of rates will be no higher than if separate rates (and separate corporate entities) were maintained for Boston Edison, Cambridge and Commonwealth, there is no net harm from the consolidation." *Id.* From a purely mathematical perspective, NSTAR may be correct that these three aggregated rates will be no higher than separate rates. However, with respect to NSTAR's proposal to blend the Basic Service rates for small commercial and residential customers across the Northeast Massachusetts load zone ("NEMA") and the Southeast Massachusetts load zone ("SEMA"), that mathematical

[7] NSTAR has indicted that with respect to the one customer, Biogen Idec MA Inc., who currently takes Standby Service under a special contract pegged to the SB-G3 rate Cambridge has executed an amendment to that contract which guarantees that the rate increases associated with the reclassification of the 13.8 kV system will not apply to that customer (Exh. RR-DTE-3(Supp)).

neutrality and the simplicity benefits cited do not outweigh the harm to competition that such blending is likely to inflict.

Under NSTAR's proposal, all residential and small commercial customers in the three franchise areas who take Basic Service from NSTAR will no longer be charged the actual cost of that service. Instead of seeing the price established in the ISO-NE markets for NEMA and SEMA, customers will see an artificial, weighted average price. As NSTAR has noted, the Department has previously allowed the blending of rates for Default Service by Boston Edison and Massachusetts Electric Company for their residential and small C&I customers. *Procurement of Default Service*, D.T.E. 02-40-A, at 10-11 (2003). However, the context for that decision did not involve the merger of multiple franchise areas. It pertained to single franchise areas with customers in two different zones. *Id.* at 4. Customers within the Cambridge and Commonwealth franchise areas were not the subject of that proceeding; no precedent was or could have been established for those franchise areas. Moreover the Department expressed some reservations about that approach, vowing to "revisit this issue after experience is gained regarding CMS [ISO-NE's transmission Congestion Management System], in particular the differences that may arise in congestion costs among the various zones, and the development of competition for these customer classes." *Id.* at 11. The Department's reservations were explained as follows:

> . . . Competitive suppliers may find it more expensive to provide generation service to customers in NEMA than in other zones. In principle, default service prices should not be artificially exempt from internalizing the same zone differentials that competitive supply must account for in attracting customers. Therefore, distribution companies should procure default service supply separately for each load zone and establish separate default service prices for each zone, to ensure that the default service prices include the same level of congestion cost impact that competitive suppliers are likely to include in their service offerings. That is, in

> order to avoid introducing distortions into the competitive market, default service prices in each load zone should include the same level of congestion costs that suppliers serving load in the zone would incur. Zone-differentiated default service prices would avoid one form of distortion in the market, and competitive suppliers would stand on better footing to serve customers in all zones than they would otherwise. Averaging LMPs to determine a single service territory-wide default service rate could skew the market, thereby impeding the development of competition.

Id. at 8-9.

The Department also expressed concern over the likely adverse impact on customers from averaging across zones:

> With one service territory-wide rate, default service customers located in constrained zones, where high congestion exists, would pay a price lower than could be offered by the competitive market. Default service customers located in unconstrained zones, where relatively less congestion exists, would pay a price higher than would be competitively determined. Competitive suppliers would likely target customers in low congestion zones by offering a competitive price that is lower than the default service rate. Conversely, suppliers may be discouraged from marketing to customers located in constrained zones, because the competitive price they could offer these customers would include congestion costs that are higher than those included in the average default service prices. Over the long run, competitive suppliers may tend to sign up customers in the non-constrained zones, leaving customers from constrained zones more likely to rely on default service for want of attractive competitive options.

Id. at 9, fn. 6.

Given the limitations and reservations expressed by the Department regarding blended default service rates, any decision to materially broaden this practice should be deferred until the Department can revisit this policy. As no evidence was presented by NSTAR that the merger cannot occur without immediately instituting this change, any approval of the merger should exclude this feature consistent with the goal of the merger having no adverse impact on customers and on competition.

D. The merger should be conditioned on customers receiving certain credits and being shielded from unnecessary costs associated with delay in the construction of the Putnam Line.

1. Nothing in this merger proposal should serve to modify the credits due customers under the Settlement Agreement approved by the Department in D.T.E. 04-114-A/D.T.E. 03-118-A.

Pursuant to a Settlement Agreement approved by the Department in D.T.E. 04-114-A/D.T.E. 03-118-A (hereinafter, "Transmission Settlement Agreement"), Cambridge and Commonwealth agreed to credit their customers in the amounts of $2.512 million and $6.089 million, respectively, in setting new retail transmission rates for effect on January 1, 2007. *Cambridge Electric Light Company*, D.T.E. 04-114-A/D.T.E. 03-118-A, at 2 (2006). Cambridge and Commonwealth agreed to implement the credits in their 2006 reconciliation filing. *Id.* The Department should make clear that any approval of the merger in no way modifies the terms of that Settlement nor its schedule for implementation.[8]

2. Approval of the merger should be conditioned on NSTAR agreeing to shoulder the SCR/RMR costs associated with delay in the installation of the Putnam Line and the associated construction cost overruns.

On behalf of Cambridge, NSTAR entered into a Settlement Agreement dated October 7, 2005 with Mirant Kendall, LLC ("Mirant") and others (hereinafter, "Kendall Settlement Agreement"). The Kendall Settlement Agreement provided for the filing of a Revised RMR Agreement which pays to Mirant to support the operation of units Steam No. 1, Steam No. 2 and Jet No. 1 for local area support (Exh. RR-AG-10) (Att. RR-AG-10 Settlement Agreement [*Mirant Kendall, LLC and Mirant Americas Energy Marketing, LP*, Docket No. ER05-26-000] at 6-7)).

[8] Pursuant to § 2.1.2 of the Transmission Settlement Agreement, NSTAR will credit customers of Cambridge $2.512 million and Commonwealth $6.089 million in setting new retail transmission rates for effect on January 1, 2007. All such refunds will be credited between January 1, 2007 and December 31, 2007. *Cambridge Electric Light Company*, D.T.E. 04-114-A/D.T.E. 03-118-A, at 2 (2006). Over-collections in the first five months of 2005 are to be credited in 2008. Transmission Settlement Agreement, § 2.1.2.

As discussed in Section IV.A.1, *infra*, dependence on Kendall Generating Station for local network support over the 13.8 kV facilities cannot cease until the Putnam Line is completed and commissioned. In the interim, Cambridge customers are incurring substantial costs under the Revised RMR Agreement (Exh. CLC-1-6 (Att. CLC-1-6)). According to NSTAR, the Putnam Line was to have been completed by the fourth quarter of 2005 (Exh. AG-1; Tr. 1, at 120). Under terms of the Revised RMR Agreement, NSTAR may terminate that Agreement upon 120 days' prior written notice (Exh. RR-AG-10) (Att. RR-AG-10 Explanatory Statement in Support of Uncontested Settlement [*Mirant Kendall, LLC and Mirant Americas Energy Marketing, LP*, Docket No. ER05-26-000] at 6 and Kendall Settlement Agreement at 6-7)). Had the Putnam Line been completed as scheduled, termination of the Revised RMR Agreement could have occurred by May 1, 2006 or earlier (Tr. 1 at 121). Instead, NSTAR is continuing to incur over half a million dollars a month in costs under that Agreement because it has not completed the Putnam Line (Exh. CLC-1-6 (Att. CLC-1-6)).

During the course of this proceeding, NSTAR repeatedly expressed frustration over lack of control over RMR costs (Tr. 1, at 114; Tr. 2, at 259). Yet, in this instance where NSTAR could exert control over such costs via prompt termination of the Revised RMR Agreement, NSTAR has failed to do so. The cause of the delay rests squarely with NSTAR. The conduit system for the Putnam Line was installed by NSTAR in 2001 in anticipation of that new line (Tr. 1, at 130). During the 2001 construction process, "various field changes to the design" of the conduit were made.[9] *Id.* Despite the fact that an NSTAR company managed the construction process in 2001 (Tr. 1, at 131), the drawings of the conduit system do not reflect its alignment nor obstructions now being encountered (Tr. 1, at 125-126). The conduit is configured in a way

[9] Those "field changes" included changing the elevation and the vertical and horizontal pitches of the conduit. (Tr. 1, at 130).

that "limits the ability to pull cable" and has led to the failure of one cable thus far due to damage to its outside jacket (Tr. 1, at 130-131). That cable has had to be replaced (Tr. 1, at 131).

NSTAR is unable to say when the Putnam Line installation issue will be resolved, much less when it will send notice of termination to Mirant (Exh. AG-5-4(c)). NSTAR is also unable to provide an estimate of, much less a commitment to, the final cost of the installation. According to NSTAR, the original cost estimate of approximately $11.4 million has already been revised upward to $13.3 million (Exh. RR-TEC-1(1)). In terms of a final cost estimate, "the Company is finalizing the engineering design for completing the second 115 kV transmission line between Putnam and East Cambridge substations. Until the design is finalized, updated cost estimates for the project cannot be performed" (Exh. RR-TEC-1(2)). Whatever those costs turn out to be, however, NSTAR fully intends to recover them in full in transmission rates (Exh. AG-5-4(c)).

The several millions of dollars in construction cost overruns should not be borne by the customers of Cambridge. In addition, the millions of dollars in avoidable and unnecessary SCR/RMR costs from May 1, 2006 forward should be borne by NSTAR, not its customers. Rather than focusing on a merger with few or no customer benefits, NSTAR should be concerned with managing a project which could avoid millions of dollars of additional costs for its customers. Approval of the proposed merger without dealing with this on-going hemorrhage of ratepayer dollars would send a message of regulatory indifference, or worse. Therefore, approval of the merger should be conditioned on NSTAR agreeing to shoulder the SCR/RMR costs associated with delay in the installation of the Putnam Line beyond May 1, 2006 and all associated construction costs in excess of the original $11.4 million estimate.

3. The Kendall RMR Agreement refund should be flowed back to customers immediately.

According to NSTAR, ISO-NE has refunded to NSTAR $4 million in connection with the Revised RMR Agreement pertaining to Kendall Generating Station (Exh. CLC-1-6 (Att. CLC-1-6, Note 2)). It is unclear from the record what the disposition of that $4 million refund is. That $4 million should be refunded immediately to Cambridge customers as a condition of any approval of the proposed merger. NSTAR should not be permitted to keep the refunded dollars and slowly credit future costs against it through 2007.

V. CONCLUSION

The Rate Settlement Agreement contemplated a merger of the NSTAR's retail franchises into one company (Rate Settlement Agreement, § 2.16). It did not, however, contemplate doing so in a manner that would prematurely reclassify the 13.8 kV assets in Cambridge, raise contract demand charges for Cambridge customers, and blend Basic Service rates over the three existing franchise areas.

For all of the reasons set forth above, The Energy Consortium requests that any approval of the proposed merger be conditioned as follows:

A. the reclassification of the 13.8 kV transmission assets to distribution assets should become effective no earlier than (i) the commercial date of operation of the Putnam Line, (ii) transfer of load to the East Cambridge Substation, and (iii) approval by the Department of distribution revenue requirements for those assets based on the Department's rate-making requirements;

B. the proposed increases in contract demand charges to the SB-G2 and SB-G3 rates of Cambridge should be rejected as anti-competitive and contrary to the Standby Rate Settlement Agreement;

C. the proposed further consolidation of Basic Service pricing should be rejected as potentially adverse to the development of a competitive retail market, and

D. customers should receive certain credits and be shielded by NSTAR from costs associated with delay in the construction of the Putnam Line, as set forth in Section IV.D, *infra*.

Respectfully submitted,

THE ENERGY CONSORTIUM

By its attorneys,

Mary Beth Gentleman
Richard W. Benka
Foley Hoag LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600
(617) 832-1000 (telephone)
(617) 832-7000 (facsimile)

Dated: September 6, 2006

B3244063